SUPREME COURT, U. S.

SEP 12 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

No. 394.

OCTOBER TERM, 1969.

CHARLIE DELIA,

Petitioner,

vs.

COURT OF COMMON PLEAS OF CUYAHOGA COUNTY,

and

SHAKER AIR CONDITIONING CO.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JOHN T. CORRIGAN,

Prosecuting Attorney of Cuyahoga County, Ohio,

JOHN L. DOWLING,

Assistant Prosecuting Attorney,

Criminal Courts Building,
1560 East 21st Street,
Cleveland, Ohio 44114,

Counsel for Respondent Court of Common Pleas of Cuyahoga County.

(Other Counsel on inside of cover.)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

WOODLE, WACHTEL, BEGAM & WOLK,
EDWIN F. WOODLE,
628 Keith Building,
Cleveland, Ohio,

EMANUEL M. ROSE,
Leader Building,
Cleveland, Ohio,
Counsel for Petitioner,

JOSEPH L. NEWMAN,
809 Society National Bank Building,
Cleveland, Ohio,
Counsel for Respondent
Shaker Air Conditioning Co.

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ISSUE.

The Court of Common Pleas does not agree with Charlie Delia as to the real issues in this case. The Court of Common Pleas suggests that the issue is as follows:

Where there is no deliberate or conscious effort by a state trial court to discriminate against a litigant in such court against whom a judgment is entered, and the judgment is affirmed by an appellate court on complete review, will an independent action lie on behalf of the disappointed litigant to enable him to re-litigate the cause by the mere conclusory allegation of denial of due process and equal protection of the laws?

The Court of Common Pleas suggests that the answer to that question is negative.

ARGUMENT.

The Complaint in this case is a rather thinly disguised effort to relitigate in the federal courts a matter which has been thoroughly litigated in the state courts of Ohio and decided adversely to the plaintiff herein. It is a collateral attack on a valid judgment of the defendant Common Pleas Court which was affirmed on appeal. By invoking the civil rights statutes, Charlie Delia would have to be credited with ingenuity and originality except for the fact, as will be discussed later in this brief, that such a method has been attempted heretofore in other courts by other plaintiffs and the method has been found wanting.

In paragraph 12 of the Complaint, the plaintiff indicates, albeit rather vaguely, that he exhausted his remedies in the state court, presumably by a motion to certify to the Supreme Court of Ohio and an appeal as of right on constitutional grounds.

The Complaint implies, in paragraph one, that Charlie Delia's constitutional rights were violated, not alone by the defendant Common Pleas Court of Cuyahoga County, but also by the Court of Appeals for the Eighth Appellate District of Ohio, which is not a defendant, and by the Supreme Court of Ohio, which is not a defendant. Why are these courts omitted?

Charlie Delia would like completely to ignore the fact that the action of the Court of Common Pleas was given a full and complete review by the Eighth District Court of Appeals upon the record and upon the brief of his counsel, bringing before that court all alleged errors. If the plaintiff's rights under the Fourteenth Amendment were violated, it may well be inquired why there was no petition to the Supreme Court of the United States for a

writ of certiorari to the Supreme Court of Ohio, or a direct appeal to the Supreme Court of the United States. 28 U.S.C. 1257; 28 U.S.C. 2101.

What is especially noteworthy about the complaint is the total absence therefrom of any allegation that the defendant Court of Common Pleas had any *purpose* or *intention* or *reason* to discriminate against the plaintiff or deny him due process or equal protection of the laws.

Assuming for the sake of argument, without conceding, that the defendant court committed any error of law in deciding adversely to the plaintiff, there is a line of cases which clearly establishes that a disappointed litigant may not, simply by reason of error of law, invoke the civil rights statutes to start all over again to try to get a favorable decision from the federal courts. The leading case is *Bottone v. Lindsley,* 170 F.2d 705 (10th Circuit), decided November 5, 1948, certiorari denied 69 S. Ct. 810, 336 U.S. 944, 93 L. Ed. 1101.

In *Bottone v. Lindsley,* the court said, at page 707:

> "It is conceivable that persons, either individually or acting in concert might so use the state judicial process as to deprive a person of his property without due process of law, or of equal protection of the laws, yet we are certain that to make out a cause of action under the Civil Rights Statutes, the state court proceedings must have been a complete nullity, with a purpose to deprive a person of his property without due process of law. To hold otherwise would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision."

The same decision notes, with citations given therein, that the Fourteenth Amendment did not alter the basic

relations between the states and the national government, and that the Fourteenth Amendment does not assure uniformity of decisions or *immunity* from *merely erroneous action.*

The Complaint seeks to open the flood gates and sweep away the doctrine of judicial immunity. It is no excuse to say that the within action is simply a declaratory judgment action. If Charlie Delia were to prevail on declaratory judgment, the next step would be a damage action. Charle Delia's brief in this Court (p. 6) admits that the "person" who allegedly caused the deprivation of Charlie Delia's constitutional rights is a member of the defendant court and *was acting only in his capacity as a member of the court* in causing the deprivation of Delia's right.

Later decisions reaching the same result as *Bottone v. Lindsley* and citing that case with approval are: *Johnson v. Stone* (1959), Illinois, 268 F.2d 803; *Sarelas v. Sheehan* (1963), 7th Cir., 326 F.2d 490; *Basista v. Weir* (1964), U.S.D.C. W.D. Pa., 225 F. Supp. 619.

Rather than attempt to gild the lily by further argument, the appellee Court of Common Pleas respectfully refers this Court to the memorandum of the eminent district judge William K. Thomas, on the motion to dismiss the complaint and to Judge Thomas' memorandum at the time of overruling the motion for reconsideration and requests this Court to consider the same memorandums as part of our argument.

In consideration of the foregoing reasons and authorities, it is submitted that the complaint in this case fails to state facts on which relief can be granted; that the decision of the federal district court should be affirmed.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,

By JOHN L. DOWLING,
Assistant Prosecuting Attorney,

Attorneys for Respondent
Court of Common Pleas,
Cuyahoga County, Ohio.